In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 214

GILCREASE OIL COMPANY, *Petitioner,*

v.

G. M. COSBY, *et al.*, *Respondents.*

RESPONDENTS' BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Supreme Court of the United States and the Honorable Judges Thereof:

Respondents, G. M. Cosby, Mrs. Rosa Croley, surviving widow and sole legatee of J. W. Croley, deceased, and B. A. Skipper, respectfully pray that this Honorable Court deny petitioner's application for writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and that said application be dismissed for the reasons hereinafter set out.

RESPONDENTS' ADDITIONAL STATEMENT OF THE CASE

The statement contained in the petition for writ of certiorari on the whole is correct, but respondents desire to

make a brief additional statement to correct certain inaccuracies and omissions therein.

While this suit as originally brought is in form of trespass to try title in Texas, it was tried in the District Court for the Eastern District of Texas as a boundary suit, and the issue involved was the location of the boundary line between the two adjoining surveys, namely, the Hathaway Survey on the north and the Castleberry Survey on the South, and the boundary line between the Arthur Christian tract of land in the Hathaway Survey and the Thad Snoddy tract of land in the Castleberry Survey; also to determine whether or not the three oil wells which were drilled by respondents on the two-acre strip of land referred to in the petition for writ of certiorari were located on land out of the Arthur Christian tract in the Hathaway Survey or were on lands out of the Thad Snoddy tract in the Castleberry Survey. Obviously the determination of this issue involved questions of fact which were passed on both by the District Court and by the Circuit Court of Appeals.

On conflicting evidence the trial court found (a) the true line between the Arthur Christian land in the Hathaway Survey and the Thad Snoddy land in the Castleberry Survey; (b) the Arthur Christian southernmost line of possession and occupation, which was the fence which had stood along the north side of the old lane between the Christian and Snoddy tracts; and (c) that all of these lines were north of respondents' three oil wells, and that petitioner had no title to them. (R. pp. 508, 509 and 510.)

Reference is made in the summary statement contained in the petition for writ of certiorari to what is called "Snoddy quit-claims." The instruments referred to as "Snoddy

quit-claims" are (1) an affidavit of Thad Snoddy dated February 11, 1936 (R. p. 362) and (2) an assignment from B. A. Skipper Oil Company and B. A. Skipper to J. W. Croley, dated July 1, 1936 (R. pp. 365 and 366); the latter instrument containing language of conveyance and transferring and assigning unto J. W. Croley a certain oil and gas lease originally executed by Thad Snoddy, and not being the Christian lease under which petitioner claims. (R. p. 367.)

Upon the findings of fact and conclusions of law (R. pp. 502 to 512), the trial court entered judgment that the plaintiff take nothing from the defendants. (R. p. 513.) Petitioner did not at that time move nor request the court by motion or otherwise to alter or amend the judgment so that a small portion of the strip on which none of the wells were located might be awarded to petitioner. There was no substantial controversy during the trial of the case about this small part of the land now complained of in petitioner's application for writ of certiorari. None of the three wells in controversy were located thereon (R. p. 510), and same was not shown to be of any value; petitioner never contended for it separate and apart from its right to recover the whole tract. (R. pp. 2 to 5.)

The issue of fact turned upon the actual location on the ground of the tract in dispute and both the District Court and the Circuit Court have passed upon that issue of fact. (R. pp. 509 and 525.)

JURISDICTION OF SUPREME COURT

Respondents desire to call the attention of the court to the statement as to the proceedings in the Circuit Court

of Appeals for the Fifth Circuit contained on page 14 of the Brief of Petitioner in support of Petition for Writ of Certiorari. Under Section 350 Title 28, *U. S. C. A.*, and the holding of this Court in *Gypsy Oil Company v. Escoe*, 48 Sup. Ct. 112, 275 U. S. 498, 72 L. ed. 393, the petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit filed on July 30, 1943 by petitioner herein is filed too late, even though extensions of time were granted as set forth in the petition for the writ. Section 350, Title 28, *U. S. C. A.* provides among other things:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

This section provides that for good cause shown the period for applying for a writ of certiorari may be extended, not exceeding 60 days, by a Justice of the Supreme Court. We direct attention to the fact that petitioner, after the order of March 4, 1943 (R. p. 537) denying the first motion for rehearing was entered, filed on May 1, 1943, a motion for leave to file a second petition for rehearing (R. p. 538), which motion for leave to file such second petition for rehearing was denied by an order entered on July 3, 1943. (R. p. 549.) Under the holding of the *Gypsy Oil Company case* the presenting by petitioners of a motion for leave to file a second petition for rehearing, which leave was never granted, did not suspend the running of the time within which the petition for writ of certiorari could be filed, namely, three months from March 4, 1943.

RESPONDENTS' REPLY TO PETITIONER'S SPECIFICATION OF ERROR NO. 1

Petitioner did not acquire any title by virtue of an erroneous recitation in deeds and assignments under which respondents claimed, and to which petitioner was a stranger, which recitation is ambiguous when placed upon the ground as a part of the description, particularly since petitioner's title originated long prior to such instruments so that it did not rely thereon, and the recitation is not a recital in its favor and especially since respondents acquired from the true owner a title paramount to petitioner's title and the Circuit Court of Appeals did not err in so holding.

RESPONDENTS' REPLY TO PETITIONER'S SPECIFICATION OF ERROR NO. 2

The judgment of the trial court, as well as the opinion of the Circuit Court of Appeals, was primarily based on the finding and location of the boundary line between petitioner's tract of land and respondents' tract, and upon the finding of fact that the three wells in controversy are not located on lands of petitioner. The fact that the trial court, as well as the Circuit Court of Appeals, held that in addition to such finding, petitioner, by its conduct, would in equity be estopped from asserting title to the three wells in question, was not error. Neither the judgment of the trial court nor the opinion of the Circuit Court of Appeals was based upon a holding that petitioner failed to set up its title in hearings before the Railroad Commission of Texas.

RESPONDENTS' REPLY TO PETITIONER'S SPECIFICATION NO. 3

It was not error on the part of the Circuit Court of Appeals in affirming judgment of the District Court that petitioner's claim be denied for the north part of the strip in dispute, contrary to the trial court's findings of fact, where it appears the controversy was over three oil wells none of which were located on the north part of such strip complained of by petitioner, and where such portion is not shown to have any value and petitioner never asked that judgment be reformed in its favor therefor.

ARGUMENT

SUMMARY OF ARGUMENT

1. Where the trial court, upon conflict of evidence, finds that the three oil wells in controversy are not covered by petitioner's oil lease, and are not located on land ever owned by or in the possession of petitioner or its predecessors in title, but does find that they are located on lands covered by respondents' lease acquired from holder of paramount title located in a different survey, such findings of fact are conclusive on this Court, as well as on the United States Circuit Court of Appeals.

2. The trial court did not deny petitioner's right to claim land because it elected not to appear and set up title before the Railroad Commission of Texas, but did find that petitioner by its conduct in procuring three oil wells as offsets to the three wells drilled by respondents, to which petitioner would not otherwise have been entitled, would in equity be estopped from later asserting title to respondents' three

wells. This finding was in addition to the fact finding that petitioner, having the burden to establish its title to the three wells in controversy, failed to do so.

3. The controversy between petitioner and respondents was over the ownership of three oil wells located on the south portion of a two-acre strip of land in the Castleberry Survey in Gregg County, Texas; and upon trial of the issue the trial court determined the true boundary line between petitioner's land and that of respondents, and found that all three of the wells were located on lands belonging to respondents. In the absence of any showing that the remainder of the strip had any value, and the absence of request for amendment of judgment, petitioner can not now complain of alleged departure from accepted and usual course of judicial proceeding.

NO CONFLICT WITH STATE DECISIONS

I.

Petitioner did not acquire any title by virtue of an erroneous recitation in deeds and assignments under which respondents claimed, and to which petitioner was a stranger, which recitation is ambiguous when placed upon the ground as a part of the description, particularly since petitioner's title originated long prior to such instruments so that it did not rely thereon, and the recitation is not a recital in its favor, and especially since respondents acquired from the true owner a title paramount to petitioner's title; and the Circuit Court of Appeals did not err in so holding.

Petitioner cites the case of *Ballard v. Stanolind Oil & Gas Co.* (5th Circuit), 80 F. (2d) 588, as supporting his

Specification of Error No. 1. The facts in that case are entirely different from the facts in the instant case. The *Ballard case* announces the correct principles of law when the court in its opinion in that case says:

> "The purpose of a re-survey is to trace the footsteps of the original surveyor. When the marks of his footsteps are found they control. When they cannot be found old use and occupancy, old recognition, must suffice. * * * Without the fence and the occupancy to fix the original line, the true location of it would be left in great uncertainty and obscurity. With that evidence, whether the fence be viewed as a boundary line established by acquiescence, or as evidence of where the old line truly was, we agree with the District Judge that the boundary line between the surveys may and should be fixed by it."

It will be noted that the two-acre tract in question in this suit is out of the Castleberry Survey, while the one hundred acre tract under which the petitioner claims is out of the Hathaway Survey. The original monuments called for in the patents of the two surveys no longer exist. The evidence shows that in 1896 the Hathaway Survey was divided into two parts by the then owners, Rucker and Bass (R. p. 376), and that in fixing the south line of the Hathaway Survey in this deed two monuments, a red oak tree and sweet gum tree, are called for, and that the same are still on the ground and well marked and identified by some of the witnesses. (R. pp. 195 and 200.) These monuments, together with the existence of the old line between the two tracts found by the surveyor Grothaus prior to the acquisition of any title either by petitioner or by respondents (R. p. 199), as well as the testimony of former owner of the land in question, constituted a sufficient basis for the trial court finding and locating the true boundary line between the two tracts

of land. (R. p. 509.) They constituted the best evidence of the true boundary line. As said by the Court of Civil Appeals of Texas in *Atlantic Oil Producing Company, et al. v. Hughey, et al.*, 107 S. W. (2d) 613, and afffimed by the Supreme Court of Texas, 109 S. W. (2d) 1041, the answer to the question of locating boundaries is to be found in following the footsteps of the surveyor. This is the established rule in Texas.

Petitioner attached much importance to the recitation in the various deeds and assignments both from Arthur Christian and Thad Snoddy to respondents, which reads: "Thence following a fence on the North line of Thad Snoddy 50-acre tract. * * *" The evidence showed that this recitation when fitted on the ground and applied to the facts as found on the ground was ambiguous; that the fence along the boundary line between the two tracts of land had been moved since the oil boom. (R. p. 289.)

As stated by petitioner in his brief in support of his petition for writ of certiorari (page 18), "it owned to the south boundary line of the Arthur Christian tract wherever it may be." The trial court found and located the south boundary line of the Arthur Christian tract, both the record line (R. p. 509, Subdivision 11 of the Findings of Fact) and the southernmost line of occupation (R. 509, Subdivision 12 of the Findings of Fact). These findings were based upon conflicting evidence and testimony and were affirmed and upheld by the Circuit Court of Appeals for the Fifth Circuit. It has long been the rule in this Court that where such findings have been made by the two lower courts this Court will not disturb them. *Page v. Arkansas Natural Gas Corporation*, 286 U. S. 269, 76 L. ed. 1096.

It is true that recitals are binding on privies in blood, privies in estate and privies in law, but certainly not binding on, and cannot be taken advantage of by, total strangers. Petitioner holds title under Arthur Christian to a 31-acre tract out of the Hathaway Survey. (R. p. 354.) Respondents hold title under Thad Snoddy to that portion of a two-acre tract upon which respondents' wells are located, which is in an entirely different survey, namely the Castleberry Survey. (R. pp. 365 and 473.) The fact that respondents also had an assignment of the Arthur Christian lease executed subsequent to petitioner's lease would not prevent them from acquiring an outstanding paramount title. These assignments from Skipper and Bumpass did not cover any land owned by petitioner. The chain of title under which petitioner holds and the chain of title to the Thad Snoddy tract are entirely different and independent of each other.

The facts in the case of *McBride v. Loomis* (Texas Supreme Court), 212 S. W. 480, are entirely different from the facts in this case, and the opinion of the Circuit Court of Appeals in this case is not in conflict with that decision. In the first place, it is shown that the reference to the fence along the north line of the Thad Snoddy tract, about which petitioner is so insistent, was an erroneous reference, and when fitted to the facts on the ground did not apply. At most under the holding in the *Loomis case*, it would only be evidentiary. The trial court upon sufficient facts repudiated petitioner's theory that the so-called fence was along the old hedge row. The following quotation from the case of *McBride v. Loomis* is sufficient to show that the facts in

that case are entirely distinguishable from those of this case:

> "The quit-claim deed from the Howard heirs to defendant did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed by him under Howard, the common source."

Certainly the purchasing by respondents for valuable consideration of the outstanding title from Thad Snoddy and his subsequent vendees, as was done in this case, constituted the acquisition of a new and independent title.

As said by the Supreme Court of Texas in the case of *Rice v. St. Louis A. & P. Ry. Co.*, 22 S. W. 1047:

> "Notwithstanding the proof of the insufficiency of his title under the common source, the defendant may still default the action by showing that there is a title superior to that of the person or persons under whom both claim, and that he is the holder of that title."

An estoppel cannot be invoked as an instrumentality of gain or profit. The rule is announced by the Supreme Court of the State of Texas in *Williams v. Chandler* (25 Tex. 4):

> "The doctrine of estoppel, invoked by the plaintiff's counsel, manifestly has no application to his case. Recitals in deeds operate as estoppels only between the parties to the deed and privies. They do not operate a conclusion or estoppel in favor of a stranger to the instrument, any more than does a record operate an estoppel in favor of or against one who was not party to the record. Nothing is better settled than that a special averment or recital in a deed or instrument under seal is conclusive between the parties and privies, against the party by whom it is made, in the course of the transaction in which it is given. But this rule must be taken with the qualification that the estoppel by an admission under seal only arises in suits founded upon the instrument which contains the recital, or growing

out of the transactions in which it is given, and not in other and collateral controversies, even between the same parties. Carpenter v. Butler, 8 Mec. & W. 206; 2 S. M. L. C. 579, 4th Am. ed.; and see the notes to the leading case of Trevivan v. Lawrence, id. 435; and 4 Kent. Com. 260, and notes for the law of estoppels."

II.

The judgment of the trial court, as well as the opinion of the Circuit Court of Appeals, was primarily based on the finding and location of the boundary line between petitioner's tract of land and respondents' tract, and upon the finding of fact that the three wells in controversy are not located on lands of petitioner. The fact that the trial court, as well as the Circuit Court of Appeals, held that in addition to such finding, petitioner, by its conduct, would in equity be estopped from asserting title to the three wells in question, was not error. Neither the judgment of the trial court nor the opinion of the Circuit Court of Appeals was based upon a holding that petitioner failed to set up its title in hearings before the Railroad Commission of Texas.

This contention of petitioner is based upon the alleged conflict of the holding of the Circuit Court of Appeals for the Fifth Circuit in the instant case with the holding of the Supreme Court of Texas in *Magnolia Petroleum Co. v. R. R. Commission, et al.*, 170 S. W. (2d) 189. The *Magnolia case* was a Rule 37 case purely and simply. No one has ever claimed that the Railroad Commission of the State of Texas has jurisdiction to try titles to land. All the *Magnolia case* holds is that the granting of a permit by the Railroad Commission merely removes the conservation laws and regulations as a bar to the drilling of wells. That case has nothing whatever to do with the principles of law involved in an

equitable estoppel. In the first place, as heretofore pointed out, the trial court found that the three wells in controversy drilled by respondents were not included within the confines of the lease owned by petitioner. (R. pp. 507, 509 and 510.) This finding of fact was based upon ample evidence introduced on the trial of this case and was not and should not have been disturbed by the Circuit Court of Appeals. The trial court further found that over the period of some two and a half to three years respondents obtained permits at different times for the drilling of three oil and gas wells on their land, and that shortly after the obtaining of each permit by respondents the petitioner would go before the Railroad Commission and obtain a permit to offset each of such wells. (R. pp. 507 and 508, paragraph 9 of the trial court's findings of fact; and page 510, paragraph 14 of the trial court's findings of fact.) Certainly such conduct on the part of petitioner could at least form the basis of an estoppel. It is a well-known principle of law that "a person who knows the facts and who without objection permits another to make improvements or expenditures on or in connection with his property, or in derogation of his rights, under a claim of title or right, will be estopped to deny such title or right to the prejudice of the other." *Corpus Juris Secundum*, Vol. 31, Sec. 94, page 314. Not only did petitioner remain silent for a period of two years during the drilling of respondents' wells, in so far as asserting any title was concerned, but following the granting of each of the three permits to respondents, petitioner went before the Railroad Commission of Texas as each well was completed, and applied for and obtained a permit and drilled a well offsetting respondent's well. (R. pp. 478 to 491.) While it is true that the Railroad Commission of Texas is not a court or body

that can try titles to land, if petitioner considered respondents as a trespasser on its land it had its remedies in the courts. Coupled with this silence and inaction, petitioner, who obviously desired to drill additional wells, makes its application for its offsets as aforesaid.

Guest v. Guest (Sup. Ct. of Texas), 74 Tex. 664, 12 S. S. W. 831;

South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507;

Luling Oil & Gas Co. v. McBride Pet. Co. (Tex. Civ. App.), 135 S. W. (2d) 738;

Loper v. Menshaw Lbr. Co. (Tex. Civ. App.), 104 S. W. (2d) 597.

The finding by the trial court on the issue of estoppel was not necessary in view of the fact that the trial court found, as well as the Circuit Court of Appeals, that petitioner neither had record title nor possession of the portion of the land on which the three wells of respondents were located. Petitioner had the burden of establishing its title to the three wells and failed in that burden, and the findings as to boundaries were in truth and in fact determinative of the issues in this case.

THERE WAS NO DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THIS CAUSE CALLING FOR EXERCISE OF SUPERVISORY POWER BY THIS COURT.

III.

It was not error on the part of the Circuit Court of Appeals in affirming judgment of the District Court that petitioner's claim be denied for the north part of the strip in

dispute, contrary to the trial court's findings of fact, where it appears the controversy was over three oil wells none of which were located on the north part of such strip complained of by petitioner, and where such portion is not shown to have any value and petitioner never asked that judgment be performed in its favor therefor.

The matter at issue, as has been stated herein, was the location of a boundary line. Petitioner filed his suit on a certain tract of land which it alleged was within the boundary of its 31-acre lease.

The area involved is only a few feet and does not have any wells on it, and in so far as the mineral estate is concerned is valueless. The record is silent that petitioner ever at any time called the attention of the trial court to the fact that there might be some few feet of the land in controversy to which it would be entitled to a judgment.

The *Federal Rules of Civil Procedure* amply cover this situation and authorize clerical mistakes to be corrected at any time on the court's own motion or on the motion of any party. Rule 60, *Federal Rules of Civil Procedure, Subdivision a:* "Clerical mistakes in orders, judgments or other parts of the record and errors arising therein from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party, and after such notice, if any, as the court orders."

No motion was filed by petitioner in the trial court asking that such judgment be amended. Of course Article 7386

of the Texas Statutes (now Rule 802 of the *Rules of Procedure in Texas)*, has no application to cases under practice in the United States courts.

Rule 61, *Federal Rules of Civil Procedure*, is applicable to this case; it reads:

> "No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court, or by any of the parties, is ground for granting a new trial, or for setting aside a verdict or for vacating, modifying or otherwise disturbing an order or judgment, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The evidence shows that petitioner has drilled on its own land three offset wells to the three wells drilled and owned by respondents, so that it is presumably recovering its share of the oil. The failure of the judgment to award to petitioner a few feet of ground in between petitioner's wells and those of respondents, on which there are no wells and which has no value, certainly is harmless error, and apparently was so considered by both the trial court and the Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, filed by petitioner, should be denied.

Respectfully submitted,

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